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In the Supreme Court of the United States

OCTOBER TERM, 1980

SAN DIEGO GAS AND ELECTRIC COMPANY, APPELLANT

v.

CITY OF SAN DIEGO, ET AL.

ON APPEAL FROM THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether a municipality's planning and zoning actions constitute a taking of property without just compensation in violation of the Fifth and Fourteenth Amendments where they are rationally related to a legitimate governmental purpose and do not have an unreasonably harsh economic impact or where they prevent a landowner from making a harmful use of his land.

2. Whether the Fifth and Fourteenth Amendments require that a state court afford a remedy in damages for a land-use regulation held to be an unconstitutional taking of property where the remedies of declaratory relief and mandamus are available.

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INTEREST OF THE UNITED STATES

This case concerns the validity of a city's general planning activities aimed at ensuring orderly growth and development in an entire community, including a delicate coastal floodplain. The city's actions are alleged to constitute a taking under the Fifth and Fourteenth Amendments, and appellant seeks to compel the payment of damages in what it styles an action for inverse condemnation.

In numerous federal environmental programs Congress has encouraged state and local governments to engage in land-use planning and to enact land-use regulations aimed at promoting public health, safety, and welfare by preventing the degradation of local natural resources. See, *e.g.*, Clean Water Act, 33 U.S.C. (Supp. II) 1251(b), 1251(g). In particular, several federal statutes now require or strongly encourage state and local restrictions on development in floodplain, wetland, and tidal areas. See, *e.g.*, the National Flood Insurance Program, 42 U.S.C. 4102 (comprising the National Flood Insurance Act of 1968 and the Flood Disaster Protection Act of 1973); the Coastal Zone Management Act of 1972, 16 U.S.C. 1451(b), (d), 1452(a). A decision by the Court that the planning and regulatory activities at issue in this case are unconstitutional might call into question features of such federal or federally-assisted programs and thwart the implementation of important national policies. And a ruling that the Constitution requires that a remedy in inverse condemnation be made available to any plaintiff who proves that land-use planning activities have effected an unconstitutional taking of his property would threaten federal policies by inhibiting even constitutionally permissible land-use regulation at all levels of government through the threat of financial liability of large, though uncertain dimensions.

STATEMENT

1. Appellant San Diego Gas & Electric Company owns 412 acres of land in the Sorrento Valley approximately 19 miles north of San Diego, California (A. 36; Tr. 927).[1] Appellant ac-

[1] "A." refers to the joint appendix to the briefs filed in this Court. "J.S. App." refers to the appendix to the jurisdictional statement. There are two transcripts in the present case. The first is the transcript of court proceedings ("Tr."); the second is a compilation of pleadings entitled "Clerk's Transcript"

quired the property in 1966 as the possible site for a nuclear power plant which was projected for construction in the 1980's (A. 36; Tr. 256, 738). Slightly more than half of the 412 acres lie in an estuary known as the Los Penasquitos Lagoon (see Tr. 846, 891, 908; Ex. 43 at 2).[2] The trial court found that this estuary portion of the property (some 214 acres) was taken by the City of San Diego and that approximately 15 additional acres were damaged by the severance (Tr. 421, 682–684; A. 46).[3]

The 214-acre parcel is flat and at a low elevation (two and one-half to six feet) (A. 64; Tr. 925). One-third of the property is subject to tidal action (A. 36–37; Tr. 139–140, 669–670, 728–729); and the entire 214-acre parcel serves as a drainage basin and stilling pond for three river systems which drain thousands of acres in nearby canyons and valleys and flow into the lagoon (see A. 37, 64; Tr. 134, 311, 545, 726, 938; Ex. 43 at 2). None of the land is dry enough to till (Tr. 112). It is subject to flooding (A. 113, 123), lying within a 100-year floodplain (Tr. 312–313,

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compiled by the Clerk of the San Diego County Superior Court ("C. Tr."). References to numbered exhibits ("Ex.") are to plaintiff's (appellant's) trial exhibits.

[2] An estuary is a semi-enclosed coastal body of water which has a free connection with the open sea. Estuaries are strongly affected by tidal action and the mixing of seawater with freshwater from land drainage. Council on Environmental Quality, *Our Nation's Wetlands* 59 (1978).

[3] In the trial on damages, the parties stipulated (Tr. 682–689) that the area deemed to be acquired pursuant to the trial judge's decision on liability amounted to just under 214 acres. Two additional sections, totalling approximately 15 acres (excluding a small leased portion) were treated as remainder parcels for which severance damages were sought (Tr. 684, 721–722). The total of approximately 229 acres (which excluded a 12-acre section in the southwest corner of appellant's property and more than 170 acres to the north and east, part of which was leased to a nursery business and part of which featured residential development) was the apparent source of the 228-acre figure used by the Court of Appeal (A. 65 n.1). That court's figures on zoning classifications (*ibid.*) appear to be in error, however, since in 1973 part of the property was rezoned A-1-10, as well as A-1-1 (see A. 39). It is unclear what the trial judge believed to be the total area of the subject property, and we are advised by the City's attorney that the judge was in error as to the acreage zoned A-1-1 after the 1973 rezoning.

For simplicity's sake we will use the stipulated 214- and 229- acre figures for the property at issue and, in describing zoning changes, will use the figures cited in the trial judge's findings (A. 37, 39).

We note that the parcels described in the complaint (A. 16–20) amount to a considerably smaller acreage than was found to have been taken, and we have found no amendment to the complaint in the record that would explain this discrepancy.

953) and perhaps a 50-year floodplain (Tr. 133, 575).[4] Ninety percent of the land is within the California Coastal Act zone (A. 49; Tr. 931). The property is vacant and unimproved except for sewer and utility lines (Tr. 926–927).

When appellant acquired the 412-acre parcel in 1966, the 229-acre subject property lay in three zoning classifications: approximately 116 acres were zoned for light industrial use (M–1–A) (A. 37); a few acres were zoned residential with a five-acre minimum lot size (R–1–5) (Tr. 24, 839, 926); and the eastern half was in an agricultural "holding" category (A–1–1), which permitted, *inter alia*, residential development on a minimum lot size of one acre (A. 37).[5] The City's general plan designated the property for future industrial growth (Tr. 12, 23, 263).

In 1972 the City actively commenced to plan for future open space (A. 38). In the Spring of 1973 the City's Departments of Planning and of Community Development issued reports on the subject and the Planning Commission and the City Council discussed the matter in a series of meetings (A. 38–40). On June 7, 1973, the San Diego City Council rezoned portions of appellant's property (A. 40); of the 229 acres at issue, 112 were zoned for agricultural uses with a minimum density of one dwelling-unit per ten acres (A–1–10); nearly 77 acres remained in an industrial category (M–1–A); and nearly 50 acres remained in an agricultural holding category (A–1–1), with a recommendation that they be considered for possible industrial use upon the submission of specific development plans (Ordinance No. 11088, J.S. App. K–12; A. 39).

On June 19, 1973, the City Council adopted a proposed open space element for the City's general plan (A. 41). That element

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[4] Floodplains are the lowland and relatively flat areas adjoining inland and coastal waters, and other areas subject to flooding. U.S. Water Resources Council, *A Unified National Program for Floodplain Management* III–3 (1979). The 100- and 50-year floodplain standards mean that the chance of a flood is one or two percent respectively in any given year. See 44 C.F.R. 59.1.

[5] The "A–1–1" classification is a general "holding" category used for undeveloped lands. In addition to residential and agricultural uses, land within this classification may be used for stables, churches, public utility substations, poultry processing, and other similar activities. San Diego Municipal Code § 101.0404 (enacted by Ordinance No. 8706 N.S., adopted Aug. 16, 1962). And conditional use permits may also be granted for service stations, boarding kennels, educational institutions, and private recreation areas, golf courses, driving ranges, and research facilities (Tr. 384–385).

designated substantially all of the subject property as open space[6] but stated that a nuclear power plant, "if sensitively designed and sited," could be compatible with open space (A. 41; Ex. 11 at 24). The plan also stated that considerations of public safety "would focus upon those uses of open space designed to preclude potentially harmful developments" (Ex. 11 at 4). The Deputy City Attorney advised the Council on that date that the open space designation would not "freeze" the property; rather, permit applications would have to be considered in light of the zoning on the property (Tr. 343).

During this planning process, the City listed the estuary portion of the property for future purchase but did not attempt actually to acquire it (A. 38–41). After voters rejected a bond issue in September 1973 to secure funds for open space acquisition, the City deleted the property from its priority list of lands to be acquired (A. 41; Tr. 244–245; see Ex. 25 at 1). Appellant abandoned plans to construct a nuclear facility after various factors, including an off-shore fault, showed such a project not to be feasible (Tr. 47, 73). Appellant has made no efforts to develop the land; it has neither applied for permits or clearances (A. 114) nor solicited offers to purchase the property (A. 83).

2. On August 15, 1974, appellant filed suit against the City of San Diego alleging that it had engaged in activities designed to take appellant's land for public use without compensation or to reduce its value for future acquisition.[7] These activities included the adoption of the open space element of the general plan, the down-zoning of the property and the City's abandoned proposal to acquire the property. On April 9, 1976, the trial judge ruled that appellant had been deprived of all practical use of 214 acres

[6] "Open space" was defined as "any urban land or water surface that is essentially open or natural in character, and which has appreciable utility for park and recreation purposes, conservation of land, water or other natural resources or historic or scenic purposes" (Ex. 11 at 2).

[7] The complaint sets forth three causes of action: in the first, appellant sought inverse condemnation damages in excess of six million dollars; in the second and third, it sought injunctive relief setting aside the rezoning and the open space designation. In an amended complaint appellant added a fourth cause of action seeking a declaration that the ordinances that rezoned the property and adopted the open space element of the general plan were invalid as arbitrary and unreasonable exercises of the police power (C. Tr. 38–39). The trial court sustained the City's demurrer to the second and third counts, ruling that mandamus was "not the proper remedy to challenge the validity of a legislative act" (C. Tr. 42).

designated as open space. The court found that no development would be allowed unless it was consistent with the open space requirement in the general plan (J.S. App. A–7 to A–8), and concluded that it would have been futile, therefore, for appellant to seek development permission. The court ruled that appellant was entitled to damages for a taking from June 19, 1973, the date that the open space element of the general plan was adopted (A. 42–43; Tr. 421).

On the issue of damages, appellant presented testimony to a jury that the highest and best use of the land would be for development as an industrial park (Tr. 645). Specifically, its witnesses testified that up to 150 acres could be developed (Tr. 711), if four feet of fill (a total of 1.225 million cubic yards) was placed on a substantial portion of the property (Tr. 566, 905). However, the tidal portions of the property were conceded to be unsuitable for development and best disposed of by donation to the State (Tr. 669–670, 742). On May 20, 1976, the jury awarded appellant over $2.8 million in damages for the 214-acre parcel and nearly $290,000 in severance damages for the remainder parcels (A. 46).

3. The City appealed to the California Fourth District Court of Appeal, which upheld the judgment (A. 48–61). The California Supreme Court then granted the City's petition for a hearing (J.S. App. D), but later retransferred the case (J.S. App. E) without hearing to the court of appeal for reconsideration in light of the state supreme court's ruling in *Agins* v. *City of Tiburon*, 24 Cal.3d 266 (1979) (J.S. App. F), affirmed by this Court in No. 79–602 (June 10, 1980).

On reconsideration, the court of appeal reversed its earlier judgment. The court noted (A. 64–66) that the property is "at low elevation, is a drainage basin, tidal basin or flood plain and is subject to standing water" and is partly subject to "ocean tidal action." The court also noted that appellant had not made an application to use or improve the property or to ask the City what development might be permitted. The opinion further stated that even assuming no use was acceptable to the City, the remedy would be mandamus or declaratory relief, not inverse condemnation. But the court noted that on the present record, whether the City had arbitrarily exercised its police power by enacting an unconstitutional zoning law and general plan element or by applying the zoning and general plan unconstitutionally were "disputed fact issues not covered by the trial court in its findings and conclusions" (A. 66). The appellate

court reversed the trial court's judgment and stated that appellant could elect to retry the case to reach a resolution of the disputed fact issues. The California Supreme Court denied appellant's petition for a hearing (J.S. App. I).

SUMMARY OF ARGUMENT

I

1. In determining whether government regulation of the uses of property is invalid as an uncompensated taking within the meaning of the Fifth and Fourteenth Amendments, the governing precedents require consideration of a number of factors that fall into two basic categories: the character of the government action and its economic impact on the property owner. This Court has never found a taking where, as in this case, the government action took the form of a "public program adjusting the benefits and burdens of economic life to promote the common good" (*Penn Central Transportation Co* v. *New York City*, 438 U.S. 104, 124 (1978)) and the property owner's reasonable expectations respecting beneficial uses of the property were not thwarted. Even substantial diminutions in the value of the property will not ordinarily constitute a sufficiently harsh impact to warrant striking down the regulation as a taking.

In the present case, appellant challenges three categories of governmental actions as takings: (1) the 1973 rezoning of the subject property; (2) the City's proposal at one point to acquire part of the property and its later abandonment of the proposal; and (3) the identification of part of appellant's property as coming within the "open space" element of the City's general plan. The first two challenges do not warrant serious consideration. Following the rezoning, 77 acres were zoned for industrial use and nearly fifty more were placed in a category that appellant's witnesses testified made it likely that they too would be available for industrial development. This left appellant with more property available for such use than it possessed before the rezoning. As to the second challenged action, the trial court did not find that the proposed, and later abandoned, acquisition plans were formulated in bad faith, and its findings concerning the date on which the property allegedly became valueless make the acquisition proposals irrelevant to the court's conclusion that the City effected a taking of the property.

The trial court found that because of the City's designation of appellant's property as open space, it would have been futile for

appellant to apply for a permit to develop its land in accordance with the industrial use zoning; but that finding was effectively vacated when the court of appeal reversed the judgment, and that disputed issue is yet to be resolved. Because it is thus unknown what type and size of industrial development, if any, the City might have permitted upon the submission of a specific development plan, the record does not establish that the City deprived appellant of all beneficial uses of its property. Accordingly, the application of the open space plan to appellant's property was not shown to be a taking.

Even assuming that the City would have denied appellant permission to use its property for industrial development, a taking is not established because the property was not rendered valueless and appellant's reasonable expectations concerning beneficial uses were not thwarted by the City's actions.

2. Appellant's property lies in an estuary and a floodplain, and the record suggests that development on the scale proposed by appellant, which would require filling the surface of some 150 acres with more than a million cubic yards of dirt, would be likely to injure the surrounding lands and waters and aggravate the severity of floods. Decisions of this Court beginning with *Mugler* v. *Kansas*, 123 U.S. 623 (1887), support the proposition that a government may prohibit harmful uses of property—those that constitute a public nuisance or that otherwise endanger public health and safety—without triggering the Takings Clause, even where the prohibited use is the only profitable use. Such prohibitions are, of course, invalid under the Due Process Clause if they do not bear a rational relation to a legitimate governmental purpose, *e.g.*, if they are *unnecessarily* harsh.

Appellant did not in this case establish that the asserted highest and best use of its land would not amount to the equivalent of a nuisance that the City could constitutionally prohibit even if noninjurious uses would not be financially rewarding. Accordingly, appellant did not establish that the application of the City's open space plan to the property at issue here constituted a taking.

II

Appellant contends that when a state court determines that a regulation of land use has so exceeded the limits of the police power as to amount to an unconstitutional taking of property,

the court is not free to limit the plaintiff to declaratory relief and mandamus, but must afford a damages remedy on a theory of inverse condemnation. Its position rests on several flawed arguments.

First, appellant incorrectly argues that whenever a measure regulating the uses of property is deemed to constitute a taking, the Fifth Amendment mandates a compensation remedy, *i.e.*, enforced purchase of the property by the enacting governmental body. That proposition is unsupported by precedent. Decisions of this Court on which appellant relies suggest a sensitivity to legislative choice in considering what remedies to give when a statute is found to be invalid under the Takings Clause. A legislature that enacts a measure regulating land use has chosen to define property rights rather than to acquire them. If in the present case, contrary to our submission, the City has misjudged the degree to which it may validly regulate the property at issue, it should not be found to have impliedly agreed to purchase it.

Second, appellant incorrectly suggests that the injunctive remedies made available in the California courts are inadequate as a matter of constitutional law. The record does not bear out that claim. If the measures at issue were struck down, the restrictions that appellant alleges deprive it of all beneficial use of its property would be lifted; and mandamus would be available to compel the issuance of permits and the like to assure compliance with the invalidation order. Even in cases brought in federal court against federal officials, this Court has not suggested that a damages remedy is the sole adequate remedy for constitutional violations, and principles of federalism dictate greater caution in determining that damages are the only adequate remedy for violations like the one alleged here, which are established in state court suits against state or local governments.

Finally, appellant erroneously ignores the impact that its compelled-purchase remedy would have on efforts to develop sound land-use policies, an area traditionally committed to state and local governments. Compelled purchase of property not only restricts a government's options in land-use planning; it may, given the substantial size of judgments in so-called inverse condemnation cases, create budgetary problems that constrain decisions in other areas. And the mere threat of such a remedy may inhibit local governments from devising constitutional land-use policies, for fear that a court may disagree with corpo-

ration counsel on their constitutional validity. Such inhibitions may also discourage the participation of state and local governments in federal environmental programs that depend on implementation through land-use controls at the state and local level.

ARGUMENT

I. A MUNICIPALITY'S PLANNING AND ZONING ACTIONS DO NOT CONSTITUTE A TAKING OF PROPERTY WITHOUT JUST COMPENSATION IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS WHERE THEY ARE RATIONALLY RELATED TO A LEGITIMATE GOVERNMENTAL PURPOSE AND DO NOT HAVE AN UNREASONABLY HARSH ECONOMIC IMPACT OR WHERE THEY PREVENT A LANDOWNER FROM MAKING A HARMFUL USE OF HIS LAND

A. Municipal Land-Use Planning Measures that Are Rationally Related to a Legitimate Governmental Purpose and Do Not Have an Unreasonably Harsh Economic Impact on the Land Owner Do Not Constitute Takings

1. *Applicable principles*

In determining whether land-use regulations as applied to a particular section of land effect a taking of property within the meaning of the Fifth and Fourteenth Amendments, this Court has looked to a number of factors that fall within two general categories: "the character of the governmental action" and "[t]he economic impact of the regulation." *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978). See also *Agins* v. *City of Tiburon*, No. 79–602 (June 10, 1980).[8]

The first factor, the character of the governmental action, is assessed by looking at the nature of the interference with the property. Where an interference "can be characterized as a physical invasion by government" (*Penn Central Transportation Co.* v. *New York City*, *supra*, 438 U.S. at 124, citing *United States* v. *Causby*, 328 U.S. 256 (1946)), or as an acquisition of assets by the government acting in its entrepreneurial capacity, it is more vulnerable to constitutional attack. 438 U.S. at 124, 128, 135. On the other hand, a taking should rarely be found where the interference arises "from some public program

[8] As explained below (pages 12–14, *infra*), there is some doubt whether this case is properly characterized as one testing the actual application of land-use regulations.

adjusting the benefits and burdens of economic life to promote the common good." *Id.* at 124.

The second factor—the impact of the restriction on the property—necessarily requires consideration of the "bundle of rights" that is property: "[a]t least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking." *Andrus* v. *Allard*, 444 U.S. 51, 65–66 (1979).[9] It is clear that mere diminution in the value of property does not effect a taking (*Penn Central*, *supra*, 438 U.S. at 131; see also *Hadacheck* v. *Sebastian*, 239 U.S. 394, 408 (1915)). Moreover, in assessing the acceptability of the burden imposed on an owner by government regulation, it is essential to consider as well any benefits that accrue to him as a result of the application of such regulation to the property of others. *Agins* v. *City of Tiburon*, *supra*, slip op. 6. See also *Penn Central Transportation Co.* v. *New York City*, *supra*, 438 U.S. at 147 (Rehnquist, J., dissenting).

These two interdependent sets of criteria do not amount to a rigid formula for resolving all takings claims. The fundamental question raised by such claims is one of "'justice and fairness.'" 438 U.S. at 124. That is a question that "necessarily requires a weighing of private and public interests" (*Agins* v. *City of Tiburon*, *supra*, slip op. 4–5) and "ultimately calls as much for the exercise of judgment as for the application of logic." *Andrus* v. *Allard*, *supra*, 444 U.S. at 65.

2. *The essential issue is the validity of the open space element in the City's general plan*

In framing its takings claim, appellant variously describes the actions that allegedly effect the taking as "a course of regulatory conduct" (Br. 18) and as "regulatory actions" (Br. 23). Those "regulatory actions" took three forms: (1) the rezoning of part of the property in 1973; (2) the City's proposal at one point to acquire part of appellant's property and its later abandonment of the proposal; and (3) the identification of part of appellant's property as coming within the "open space" element of the

[9] The property owners' claim in *Andrus* v. *Allard*, *supra*, that they would be unable to gain any economic advantages from eagle feather artifacts they owned because they were prohibited from selling them was found unpersuasive by the Court because the owners retained the rights to donate or devise their property, and had alternatives such as displaying the artifacts for an admission charge. 444 U.S. at 65–66.

general plan. The first two of these actions are patently insufficient as even a partial basis for any takings claim.

Because appellant essentially contends (Br. 27) that the only reasonable use for its property is an industrial use, the gravamen of its complaint concerning the 1973 rezoning is the change with respect to industrial (M-1-A) zoning. Yet appellant concedes (Br. 7) that of the approximately 116 acres originally zoned M-1-A, "[a] substantial portion (approximately 77 acres)" retained that designation after the rezoning. In addition, 50 acres of the segment zoned for agricultural holding (A-1-1) not only remained in that category but were designated for future industrial use on submission of a specific development plan (A. 39). In the damages trial, witnesses, including one of the appellant's witnesses, testified (Tr. 507, 932–933) that, apart from the operation of the open space plan, they saw no problems in obtaining the City's permission to use either the 77 acres zoned M-1-A or the 50 acres designated for future industrial use. Since this would amount to industrial development on a greater acreage than was zoned for industrial use when appellant purchased the property (A. 37), a contention that the new 1973 zoning restrictions deprived appellant of any reasonable use of its property is frivolous.

The trial court (A. 36–42) made no specific factual finding that the City's listing part of appellant's property for purchase, and later deleting the property from that list after a bond issue failed, were actions taken in bad faith or that they permanently deprived the property of all value. See *Agins* v. *City of Tiburon*, *supra*, slip op. 6–7 n.9. Indeed, the trial court found that June 19, 1973, was the critical date on which the property passed from "property [with] substantial fair market value" to what the court characterized as property for which there existed "no practical, beneficial, or economic use" (A. 41, 42); the listing of the Company's property for possible acquisition occurred *before* June of 1973 (A. 40); and the deletion of the property from the list of proposed acquisitions occurred after September 1973 (A. 41). Thus, even accepting the court's characterization of the property before and after the asserted taking, it is clear that the proposal to acquire the property and the decision to abandon that proposal are simply irrelevant to the takings claim. And, as this Court noted in *Agins* v. *City of Tiburon*, *supra* (slip op. 7 n.9), in rejecting a similar contention with respect to an abortive attempt to acquire the property at issue: "Mere fluctuations in value during the process of gov-

ernmental decisionmaking, absent extraordinary delay, are 'incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense.'" *Ibid.*, quoting from *Danforth* v. *United States*, 308 U.S. 271, 285 (1939).

3. *Appellant did not prove a taking because it did not conclusively establish what uses the City would prohibit under the open space element of the general plan*

Contrary to appellant's contention (Br. 30–35), the decision of the Court of Appeal on remand from the California Supreme Court appears to have unsettled the trial court's finding (A. 42) that "it would have been totally impractical and futile for [appellant] to have applied to [the] City for the approval of any development of the property designated as open space or the remainder of the subject property." The Court of Appeal expressly noted (A. 66) that, while appellant complained that it had been "denied all use of its land which is zoned for agriculture and manufacturing but lies within the open space area of the general plan," appellant had "not made application to use or improve the property nor [had] it asked [the] City what development might be permitted." The Court concluded (*ibid.*) that if the appellant wanted to pursue an action for administrative mandamus on the theory that the City "had arbitrarily exercised its police power by enacting an unconstitutional zoning law and general plan element or by applying the zoning and general plan unconstitutionally," it would have to resolve the "disputed fact issues" at retrial.

The trial court's futility finding in fact had so little support in the record that it virtually invited reversal. It rested primarily on the speculations of three of appellant's witnesses,[10] an assumption that all zoning would have to be changed to conform to the open space elements of the general plan,[11] and a further assumption that no industrial development, whatever its design or

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[10] Appellant's evidence at trial consisted merely of the speculations of three witnesses; one, an employee of appellant, knew (Tr. 79–80) of no action of the City which supported his conclusion; the second, an attorney representing a plaintiff in a similar case, conceded (Tr. 91, 97) that he knew of an instance where approval did occur and of only one denial; and the third based his conclusion on occurrences in other jurisdictions (Tr. 276–280).

[11] Under California law, cities and counties are required to have a local open space plan for the comprehensive and long-range conservation of open space land within their jurisdictions. Cal. Gov't Code § 65302(e) (West Supp. 1980). It is not clear as a matter of state law whether the City was bound to conform its

density, would be regarded as consistent with an open space plan.[12] Directly contradicting those assumptions and speculations was testimony by City employees responsible for the City's land-use policies indicating that an open space planning designation is not equivalent to a zoning classification (Tr. 200), not necessarily inconsistent with industry (Tr. 333), and not, in itself, a ground for denying a development permit (Tr. 337). Moreover, the particular open space plan challenged by appellant provides that a "sensitively designed and sited" nuclear power plant might be compatible with open space preservation (Ex. 11 at 24). Finally, the California Supreme Court has squarely rejected, as a matter of state law, the notion that a designation in a city's general plan, even a designation of acquisition, can ever amount to a taking of property. See *Selby Realty Co.* v. *City of San Buenaventura*, 10 Cal. 3d 110, 118–121, 514 P.2d 111, 116–118, 109 Cal. Rptr. 799, 804–806 (1973); *Helix Land Co.* v. *City of San Diego*, 82 Cal. App. 3d 932, 944, 147 Cal. Rptr. 683, 689 (1978). See also DiMento, *Improving Development Control Through Planning: The Consistency Doctrine*, 5 Colum. J. Envt'l L. 1, 38–39 (1978).

If it is not a closed question whether the mere designation of appellant's property as open space in the general plan would preclude the City from granting appellant permission to use at least a portion of its property for industrial development, then the record simply does not permit an assessment whether the plan, as applied to appellant's property, amounts to a taking, because the record does not show what uses are available to appellant under that plan. Appellant's case would then rest on restrictions imposed by the zoning classifications and the City's

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zoning to the open space elements, however. The state statutory requirement that zoning changes be consistent with the open space element of a general plan did not apply to a charter city such as San Diego when the 1973 general plan was adopted. Cal. Gov't Code § 65803 (West 1966). See also *id.* at § 65700 (West Supp. 1980). There was, however, some testimony suggesting a City policy of consistency between zoning and the general plan (Tr. 365–368).

[12] The general plan defined "open space" as "any urban land or water surface that is *essentially* open or natural in character, and which has appreciable utility for park and recreation purposes, conservation of land, water or other natural resources or historic or scenic purposes" (Ex. 11 at 2 (emphasis added)). There is no explanation of how much construction might be allowed in a large area without detracting from its "essentially open or natural" character. The City's planning director testified, however (A. 140), that industrial development could well be consistent with the general plan, depending on the design and the incorporation of open space within the development itself.

abandoned proposal to purchase the property (see *Agins* v. *City of Tiburon*, *supra*, slip op. 4); and, as shown (pages 10–12, *supra*), those actions of the City are clearly insufficient bases for any taking claim.

4. *Appellant did not prove a taking because it agreed that the plan was a permissible measure taken for the public welfare and it failed to show that reasonable investment-backed expectations had been frustrated*

Even assuming that the application of the open space element in the City's general plan would preclude the City from permitting industrial development on appellant's property, it is not established under this Court's recent precedents that the City's action is invalid as an uncompensated taking of appellant's property.

Appellant evidently views the objective of the open space element in the general plan as an aim "to preserve open space on the theory that it is a physical, social, aesthetic, economic, and ecological asset" (Br. 19), and it concedes that such an aim "is not an impermissible goal or objective of governmental action in the pursuit of the public welfare and the common good[.]" It contends, instead (Br. 29–30), citing the trial court's finding that appellant "was left with land that was practically, beneficially, and economically useless," that the effect of the plan's open space element on its property constitutes a taking because it has "an unduly harsh impact * * * frustrating the owner's legitimate economic expectations."

But the trial court's finding is in large part a legal conclusion, and it fails to take into account certain undisputed evidence. Appellant's principal "investment-backed expectation" (*Penn Central Transportation Co.* v. *New York City*, *supra*, 438 U.S. at 124) in purchasing the property was to build a power plant on the land (A. 69), and that expectation was frustrated not by any action of the City—whose general plan specifically provided that such a plant might be consistent with the open space designation (see page 13, *supra*)—but by the fact that appellant discovered after purchasing the property that because of the character of the land, construction of the plant was an unreasonable use (A. 80). Selling the property to the City through an inverse condemnation suit simply permitted appellant to recoup an investment predicated on a mistaken assumption about the

character of the land it was buying. The record also indicates that the property still retained some value (at least $161,000—the "nominal" worth one of appellant's own witnesses was willing to assign to it (A. 126)) and that purchasers might be found for it (*ibid.*). This is substantially below the value found by the jury for the property absent restrictions on industrial development; but, as this Court has noted, where the regulation in question is "reasonably related to the promotion of the general welfare," severe diminutions in value have not been found sufficient to establish a taking. *Penn Central Transportation Co.* v. *New York City*, *supra*, 438 U.S. at 131. See also *Andrus* v. *Allard*, *supra*, 444 U.S. at 66; *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 594 (1962).

B. A Police Power Measure that Prohibits A Harmful Use of Property Should Not Be Deemed a Taking Even if that Harmful Use is the Only Economically Profitable Use

Even if the Court finds that, under the test discussed in Section A above, the economic impact of restrictions on appellant's use of its property is to leave appellant no economically profitable use, it does not necessarily follow that appellant has established an unconstitutional taking.

The record in this case indicates that the use appellant contended was the only profitable use of its property—industrial development requiring a large volume of dirt fill to prepare the surface for construction—may harm the condition of surrounding lands and waters and, given the fact that the property lies in a floodplain, raises questions concerning public safety. The City's open space planning was intended to take such matters into account (see page 21, *infra*). We submit that a government may restrict harmful uses of property without triggering the Takings Clause, even where the prohibited use is the only economically profitable use. Because appellant did not apply to the City for a development permit so that its construction plans could be assessed in light of safety and nuisance-prevention concerns, and did not otherwise establish that its plans for transforming the land into an industrial park would not threaten public safety or the property of others, appellant did not establish that its property has been unconstitutionally taken by the City.

1. *Decisions of this Court suggest that police power measures may validly prevent harmful uses of property so long as the measures are not arbitrarily harsh*

Decisions of this Court lend substantial support to the view that a governmental body may prohibit noxious uses of property without regard to whether that prohibition leaves the owner with other means of profitably exploiting his property.[13] Thus, although Mr. Justice Rehnquist, joined by the Chief Justice and Mr. Justice Stevens, would have found the Landmark Preservation Law at issue in *Penn Central Transportation Co.* v. *New York City*, *supra*, to be a taking, he accepted the unqualified proposition that "the government can prevent a property owner from using his property to injure others without having to compensate the owner for the value of the forbidden use." 438 U.S. at 144 (Rehnquist, J., dissenting). See also *Moore* v. *City of East Cleveland*, 431 U.S. 494, 513 (1977) (Stevens, J., concurring) (basic right to use property "has always been limited by the law of nuisance"). In this regard, he cited this Court's decision in *Mugler* v. *Kansas*, 123 U.S. 623 (1887), in which the Court upheld, against a Fourteenth Amendment challenge, a law absolutely prohibiting the operation of a brewery. The *Mugler* Court distinguished (123 U.S. at 667–668) *Pumpelly* v. *Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1871), a decision in which an overflow onto plaintiff's land caused by a state-owned dam was found to be a taking under a state constitutional provision. It noted that the question in *Pumpelly* arose under the power of eminent domain. By contrast, the Court explained (123 U.S. at 668–669):

> A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to

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[13] The majority opinion in *Penn Central* (438 U.S. at 133–134 n.30) criticized this distinction in dictum, and commentators have been divided on its usefulness. Compare, *e.g.*, Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundation of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1196–1200 (1967), with Dunham, *A Legal and Economic Basis for City Planning*, 58 Colum. L. Rev. 650, 663–669 (1958). Professor Sax's thesis that the government may prohibit uses of property that have "spillover effects" without "triggering the takings clause" is a variant of the noxious use theory. Sax, *Takings, Private Property and Public Rights*, 81 Yale L.J. 149, 155–161 (1971). Our submission does not remotely suggest that *Penn Central* was wrongly decided. It would only mean that in noxious use cases—which in our view, do not include *Penn Central*—the Court would not have to consider the economic value of the remaining uses, except in the context of an inquiry whether the prohibition was an arbitrarily and unnecessarily harsh means of achieving the legislative purpose (see page 19, *infra*).

> the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests. Nor can legislation of that character come within the Fourteenth Amendment, in any case, unless it is apparent that its real object is not to protect the community, or to promote the general well-being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law. The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.

In accord with that principle, the Court held in *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915), that a municipal government could, without offending the Fourteenth Amendment, prohibit the continued operation of a brick-making plant, despite the owner's unrefuted claims that because of large clay pit excavations, the land could not be used for any other purpose (*id. at 405) and that it was financially prohibitive to transport the clay for manufacture into bricks elsewhere (id.* at 411). Because the evidence showed "that the fumes, gases, smoke, soot, steam and dust arising from petitioner's brick-making plant have from time to time caused sickness and serious discomfort to those living in the vicinity" (*id.* at 408), the prohibition was constitutional.[14]

It is true that *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922), established a "general rule" that "while property

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[14] See also *Reinman* v. *City of Little Rock*, 237 U.S. 171 (1915) (prohibiting operation of stables in city where they produced "offensive odors" and were "productive of disease"); *Pierce Oil Corp.* v. *City of Hope*, 248 U.S. 498 (1919) (upholding a statute prohibiting storage of oils in tanks within 300 feet of dwellings, given danger of explosions); *Miller* v. *Schoene*, 276 U.S. 272, 279–280 (1928) (damage to apple orchards inflicted by diseased cedar trees justified law ordering destruction of cedars). See, generally, F. Bosselman, D. Callies & J. Banta, *The Taking Issue* 124–138 (1973).

may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." 260 U.S. at 415. The notion of "going too far" appears, moreover, to have been conceived of as a destruction of the profitable uses of property, without compensation to the owner, although Mr. Justice Holmes cautioned that "this is a question of degree" (*id.* at 416). But the issue there arose in a private injunctive suit, concerning an established use of the property, with the plaintiffs relying on a state law prohibiting certain mining operations to support their claim that, notwithstanding their purchase of property subject to the grantor-coal company's reservation of subsurface mining rights, and notwithstanding their waiver of damages, they were entitled to an injunction against any mining that threatened subsidence of the ground beneath their house. Mr. Justice Holmes appeared to be strongly influenced by the fact that the plaintiffs had "seen fit to take the risk of acquiring only surface rights" (*ibid.*) and were invoking the state mining law as a means of abrogating their bargain. He acknowledged (*id.* at 415) the validity of laws of general application which "secured an average reciprocity of advantage that has been recognized as a justification of various laws."[15]

This Court has repeatedly cited the "general rule" in *Pennsylvania Coal*, but it has never relied upon it to find that a police power regulation restricting the uses of property is invalid under the Takings Clause.[16] Reliance on that rule may

[15] A number of courts have found *Pennsylvania Coal* inapplicable where such laws of general application are concerned. See, *e.g.*, *Marblehead Land Co.* v. *City of Los Angeles*, 47 F.2d 528, 532 (9th Cir.), cert. denied, 284 U.S. 634 (1931); *Sibson* v. *State*, 115 N.H. 124, 336 A.2d 239 (1975); *Consolidated Rock Products Co.* v. *City of Los Angeles*, 57 Cal.2d 515, 528–529, 370 P.2d 342, 350–351, 20 Cal. Rptr. 638, 646–647, appeal dismissed for want of a substantial federal question, 371 U.S. 36 (1962); *West Bros. Brick Co.* v. *City of Alexandria*, 169 Va. 271, 192 S.E. 881, appeal dismissed for want of a substantial federal question, 302 U.S. 658 (1937).

[16] See, *e.g.*, *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 594 (1962); *Penn Central Transportation Co.* v. *New York City*, *supra*, 438 U.S. at 127; *Andrus* v. *Allard*, *supra*, 444 U.S. at 66. In *Nectow* v. *City of Cambridge*, 277 U.S. 183 (1928), the Court struck down a zoning ordinance, but it did so because it determined that the ordinance did not promote the public health, safety, convenience or welfare and thus did not survive challenge under the Due Process Clause. In *Armstrong* v. *United States*, 364 U.S. 40 (1960), the Court, relying in part on *Pennsylvania Coal*, found (364 U.S. at 48) that the government's exercise of an option under a ship construction contract was a taking because it totally destroyed a materialman's lien; but the case involved no police power regulation, and—as the Court pointed out (*id.* at 49)—the government itself was "the direct, positive beneficiary."

well be justified in cases in which a law produces some desideratum for the general public by imposing the burden on a property owner whose use of his property in no way creates a public nuisance or otherwise endangers public health or safety. But where a "forbidden use is dangerous to the safety, health, or welfare of others" *Penn Central Transportation Co.* v. *New York City*, *supra*, 438 U.S. at 145 (Rehnquist, J., dissenting)), the Takings Clause should not be deemed a restraint on the government's efforts to eliminate the danger; and *a fortiori*, the one creating the danger should not expect to be paid for desisting whenever he can show that noninjurious uses of his property will produce no economic profits.

This, of course, does not leave government free to act arbitrarily in its exercise of the police power to prevent harms. Although, since the demise of substantive due process, the Court no longer sits "as 'a superlegislature'" (*Ferguson* v. *Skrupa*, 372 U.S. 726, 731 (1963) (citation omitted); see also *Daniel* v. *Family Security Life Insurance Co.*, 336 U.S. 220, 223–224 (1949)), it will still examine a law to determine whether "it bears a reasonable relation" to a "legitimate" government purpose. *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117, 124–125 (1978). The mere invocation of public health and safety would not suffice to save a law that employed means not reasonably related to the achievement of the noble aims invoked; and unnecessary harshness in such a measure should not survive the test. In any event, the owners of real property who wished to use it in ways deemed by local, state, or federal legislatures to be injurious to public health or safety or to create a public nuisance would enjoy the same protections against oppressive government action that those with other types of property interests enjoy.[17]

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[17] See, *e.g.*, *North Dakota Pharmacy Board* v. *Snyder's Stores*, 414 U.S. 156 (1973) (upholding regulation eliminating nonpharmacists from ownership of pharmacies); *Daniel* v. *Family Security Life Insurance Co.*, *supra*, 336 U.S. at 223–224 (upholding prohibition with the effect of destroying an existing funeral insurance company); *United States* v. *Carolene Products Co.*, 304 U.S. 144 (1938) (Court found no Fifth Amendment "taking," though the defendant was prevented from shipping filled milk with the property accordingly rendered worthless); *Eberle* v. *Michigan*, 232 U.S. 700, 707 (1914) (liquor); *Baccus* v. *Louisiana*, 232 U.S. 334, 337–338 (1914) (prohibition of itinerant vendors); *Purity Extract & Tonic Co.* v. *Lynch*, 226 U.S. 192 (1912) (liquor); *North American Cold Storage Co.* v. *City of Chicago*, 211 U.S. 306, 320–321 (1908) (upholding order to destroy unwholesome food though value might otherwise remain); *Reduction Co.* v. *Sanitary Works*, 199 U.S. 306, 321–325 (1905) (up-

2. *Appellant's use of its property for industrial development would be likely to endanger surrounding lands and waters*

Appellant's property is located in a fragile ecological zone. It is part of an estuary and a wetland and lies in a floodplain and a tidal basin; substantial portions of it are subject to tidal innundation (A. 64). Appellant at no time contended that the property in question could be used in its natural state for industrial development. Even that portion of the property that was not subject to tidal action, which appellant asserted was suitable for some 140 to 150 acres of industrial development (Tr. 711), would require at least four feet of fill—a total of approximately 1.255 million cubic yards (Tr. 566, 905). In a sensitive lagoon and wetland area such development can be extremely damaging. Indeed, a representative of the California Coastal Commission testified (Tr. 961) that "as development has occurred inland, there has been a moving of additional apparent silt into the lagoon and [an acceleration of] the problem of erosion."[18] Because appellant had submitted no plans to the Coastal Commission (indeed had never drawn up any specific plans at all for any purpose (A. 80)), the Commission witness could not say absolutely whether the development appellant deems essential to its profitable

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holding cremation requirement for garbage, though value might otherwise remain); *Powell* v. *Pennsylvania*, 127 U.S. 678 (1838) (upholding state law prohibiting the manufacture of oleomargarine, and the exclusion of evidence intended to show that because of preexisting investment, a business would be destroyed); *Patterson* v. *Kentucky*, 97 U.S 501, 506 (1878) (prohibition of sale of condemned oil).

This Court has emphasized that it does not "distinguish among different kinds of property in applying the Due Process Clause." *North Georgia Finishing, Inc.* v. *DI-Chem, Inc.*, 419 U.S. 601, 608 (1975). See also *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 552 (1972) ("The right to enjoy property without unlawful deprivation * * * is in truth a 'personal' right, whether the 'property' in question be a welfare check, a home, or a savings account.").

[18] Coastal zone wetlands are a "vital national resource of critical importance to the entire nation" and their protection and conservation is state and national policy. See Protection of Wetlands, Exec. Order No. 11990, 43 Fed. Reg. 26961 (1977); Coastal Zone Management Act of 1972, 16 U.S.C. 1451(b), (d), 1452(a); California Coastal Act of 1976, Cal. Pub. Res. Code §§ 30000–30900 (West Supp. 1980). They provide spawning grounds, habitat, and food sources for fish and wildlife, and preserve water quality by acting as pollution filtration systems converting many organic pollutants to useful nutrients. Wetlands help to stabilize the coast by preventing erosion, and serve as a buffer to protect inland property from the effects of storms and flooding. See generally, Council on Environmental Quality, *Our Nation's Wetlands* (1978).

exploitation of the property would damage the surrounding waters. The most he could venture was that a development "dramatically scaled down" from others existing to the east of the subject property might be acceptable in the "far southeastern end" of the property (Tr. 968-969).[19]

The fact that appellant's property lies in a floodplain raises both a question of nuisance, stemming from development, and public safety considerations.[20] Floodplains aid in moderating floods, maintaining water quality, and recharging ground waters; and development in such areas has received increased attention in recent years owing to the rising level of flood losses and resulting costs to the general public. U.S. Water Resources Council, *Floodplain Management: Guidelines for Implementing Executive Order No. 11988*, 43 Fed. Reg. 6030, 6046-6047 (1978). As President Carter stated when issuing Executive Order No. 11988, unwise floodplain use and development "pose a severe threat to human life, health, and property." 13 Weekly Comp. of Pres. Doc. 806 (May 24, 1977).[21] The City's open space plan called for regulating land use so as to preclude harmful development in such areas (Ex. 11 at 4), and contemplated the eventual application of appropriate floodplain zoning (Ex. 11 at 8 n.6). Appellant evaded this part of the planning process by simply filing its lawsuit to compel the purchase of its land.

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[19] The jury's determination of the value of the property on the day before the open space element of the general plan was adopted in no way amounts to a finding that the development of appellant's land according to its "highest and best use" would not be environmentally damaging. At most it indicates the jury's belief that a prudent purchaser would be willing to risk a denial of a development permit by the Coastal Commission.

[20] The need to accommodate competing landowners' interests in areas such as floodplains has historically been a problem and courts have looked with disfavor upon developers who inflict injury upon neighboring landowners. California courts recognize the priority of right of the landowner affected adversely by another's modifications and perform a balancing of the equities. See *Keys* v. *Romley*, 64 Cal.2d 396, 412 P.2d 529, 50 Cal. Rptr. 273 (1966). See, generally, Dunham, *Flood Control Via the Police Power*, 107 U. Pa. L. Rev. 1098, 1100 (1959).

[21] Similarly, Congress has found that flood losses are "increasing at an alarming rate," 42 U.S.C. 4002(a)(1), (5) and "that the Nation cannot afford the tragic losses of life and property" which occur. The Flood Disaster Protection Act is designed to encourage "State and local measures which, to the maximum extent feasible, will —(1) constrict the development of land which is exposed to flood damage where appropriate, [and] (2) guide the development of proposed construction away from locations which are threatened by flood hazards * * *." 42 U.S.C. 4102(c).

In sum, appellant's assertion (Br. 25) of a "fundamental" and unrestricted "right to develop" any land it owns unless the government pays it to refrain takes no account of the damage that such development can wreak on surrounding lands and waters and the danger it can pose to public safety. The record here fails to establish that appellant's asserted "highest and best use" of its land would not amount to the equivalent of a public nuisance that the City could constitutionally prohibit notwithstanding any finding that noninjurious uses would not be financially rewarding. Accordingly, appellant has not demonstrated that any barriers the City might erect to its proposed industrial development constitute a taking of property in violation of the Fifth and Fourteenth Amendments.

II. THE FIFTH AND FOURTEENTH AMENDMENTS DO NOT REQUIRE THAT A STATE COURT AFFORD A REMEDY IN DAMAGES FOR A LAND-USE REGULATION HELD TO BE AN UNCONSTITUTIONAL TAKING OF PROPERTY, WHERE THE REMEDIES OF DECLARATORY RELIEF AND MANDAMUS ARE AVAILABLE

A. INTRODUCTION

Appellant contends (Br. 35–44) that when a state court determines that local land-use planning, including a zoning ordinance and a city's general plan, has so exceeded the limits of the police power as to constitute an unconstitutional taking of property, the court is not free to limit the plaintiffs to declaratory relief and mandamus, but must afford them the right to recover

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Federal concern over this issue is reflected in the National Flood Insurance Program, 42 U.S.C. 4001 *et seq.*, administered by the Federal Emergency Management Agency. By law, federal agencies may not approve grant money, mortgage backing, direct loans, most disaster relief, or any other taxpayer funds to support the purchase, construction or improvement of property located in a community's identified flood-prone areas, unless the community adopts appropriate floodplain measures. These federal measures, including a prohibition on development that would increase flood heights (see 44 C.F.R. 60.3(d)), have been upheld against a taking challenge. See *Texas Landowners Rights Ass'n* v. *Harris*, 453 F. Supp. 1025, 1031–1032 (D.D.C. 1978) aff'd, 598 F.2d 311 (D.C. Cir.), cert. denied, 444 U.S. 927 (1979); see also *Turner* v. *County of Del Norte*, 24 Cal. App.3d 311, 101 Cal. Rptr. 93 (1972); *Krahl* v. *Nine Mile Creek Watershed District*, 283 N.W.2d 538 (Minn. 1979); *Turnpike Realty Co.* v. *Town of Dedham*, 362 Mass. 221, 284 N.E.2d 891 (1972), cert. denied, 409 U.S. 1108 (1973).

damages on a theory of inverse condemnation.[22] We challenge that proposition.[23]

At the outset, we note that it is not entirely clear that no form of damages is ever available in the California courts to those challenging regulatory measures as takings. In *Agins* v. *City of Tiburon*, 24 Cal. 3d 266 (1979) (J.S. App. F), aff'd, No. 79-602 (June 10, 1980), the California Supreme Court stated only (J.S. App. F-2 to F-3) that when a landowner establishes that a zoning ordinance is constitutionally infirm because it "substantially limits use of his property" he "may not recover damages on the theory of inverse condemnation." In an earlier decision, *HFH, Ltd.* v. *Superior Court of Los Angeles County*, 15 Cal.3d 508, 517-520, 542 P.2d 237, 244-245, 125 Cal. Rptr. 365, 372-373 (1975), cert. denied, 425 U.S. 904 (1976), in which the California Supreme Court expressly considered the question whether "*interim* damages" (*i.e.*, damages to compensate for economic losses suffered before a zoning ordinance is invalidated by a court) might be awarded to plaintiffs who showed a reduction in the market value of property induced by zoning, the court concluded that such damages would not be available on *that* showing because a diminution in value, alone, does not prove a taking; but the court did not address the question whether such a damage claim might be added to a "mandate action" where facts showing a taking were established. 15 Cal.3d at 519-520, 542 P.2d at 245, 125 Cal. Rptr. at 373.[24] The

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[22] Contrary to repeated suggestions of the Counsel of the Pacific Legal Foundation (San Diego Urban League Br. 9), there are no allegations or evidence that the City of San Diego has engaged in exclusionary or otherwise discriminatory practices in adopting the challenged land-use measures. Moreover, the proper remedy for an exclusionary zoning ordinance would be invalidation and not money damages for a taking since such zoning must be struck down as invalid and cannot be equated to a proper exercise of the power of eminent domain.

[23] If the Court determines, contrary to our submission (pages 12-13, *supra*), that the court of appeal, in its decision on remand from the California Supreme Court, held only that the inverse condemnation remedy was unavailable, then this Court could affirm the judgment of the court of appeal without reaching the question whether a taking has occurred.

[24] In *HFH, Ltd.*, the California Supreme Court treated the issue of the availability of damages based on an inverse condemnation theory as separate from the issue of the availability of interim damages as part of a writ of mandate (see Cal. Civ. Proc. Code § 1095 (West Supp. 1980)). In discussing the latter issue, the California court did suggest that the state tort immunity statute (Cal. Gov't Code § 818.2 (West 1966)) would preclude liability for interim damages based

California Supreme Court's decision in *Agins* also did not upset settled California law that a local government's bad faith pre-condemnation activities could give rise to an inverse condemnation. See *HFH, Ltd.* v. *Superior Court of Los Angeles County*, *supra*, 15 Cal.3d at 516 n.14, 542 P.2d at 243 n.14, 125 Cal. Rptr. at 371 n.14; *Toso* v. *City of Santa Barbara*, 101 Cal. App. 3d 934, 162 Cal. Rptr. 210, 219–220 (1980), petition for cert. pending, No. 80–205.

Finally, the California Supreme Court has not necessarily foreclosed the possibility of a damages remedy where landowners, unlike appellant in this case, sue under 42 U.S.C. 1983, alleging that a zoning ordinance deprives them of their constitutionally protected property rights under color of state law. See generally, Note, *Land Use Regulation, the Federal Courts, and the Abstention Doctrine*, 89 Yale L.J. 1134, 1136–1140 (1980). The California Supreme Court has held that state courts must entertain Section 1983 actions (*Brown* v. *Pitchess*, 13 Cal.3d 518, 531 P.2d 772, 119 Cal. Rptr. 204 (1975)), and that court has not had occasion to decide what remedies are available where claims similar to those brought by appellants in the present case are raised under that federal statute. Of course, it is likely that the California Supreme Court would conclude that at least the "inverse condemnation" damages remedy is unavailable there for the same reasons it found the remedy unavailable in *Agins*, the decision controlling this case. See *Jacobson* v. *Tahoe Regional Planning Agency*, 474 F. Supp. 901 (D. Nev. 1979), appeal pending, No. 80–4039 (9th Cir.) (federal court holding that "damages for inverse condemnation" are unavailable in challenge to land-use law under 42 U.S.C. 1983).[25]

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on a claim analogous to state tort law, but avoided addressing the question of the propriety of liability for interim damages (such as holding costs) if such a claim was of constitutional dimension.

[25] We do not, like appellant (Br. 37–38), read this Court's decision in *Owen* v. *City of Independence*, No. 78–1779 (Apr. 16, 1980), as compelling the conclusion that, in suits brought under 42 U.S.C. 1983, injunctive relief is a constitutionally inadequate remedy for land-use regulations found to constitute takings. The constitutional tort involved in *Owen* was a stigmatizing discharge of a city employee effected without notice or hearing, and the Court held only that the city enjoyed no qualified immunity in suits brought under Section 1983. While the Court stated (slip op. 28) that "[a] damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees," it acknowledged the possibility that in some cases "countervailing considerations [might] counsel otherwise" (*ibid.*). As we explain below (pages 29–31, *infra*), we believe such considerations are present in cases such as this: the restraining effects of the law complained of can be lifted by

In these circumstances, this Court may deem it premature to decide now whether a damages remedy must, as a matter of federal constitutional law, be made available to those challenging land-use regulations as takings in state courts. See *Phyle* v. *Duffy*, 334 U.S. 431 (1948).

B. A Zoning Ordinance Deemed Invalid as a Taking of Property Without Compensation Is Not the Equivalent of an Exercise of the Power of Eminent Domain

Appellant's claim of entitlement to damages in "inverse condemnation" (Br. 35–41) appears to be essentially a claim "based on the right to recover just compensation for property taken by [the City] for public use in the exercise of its power of eminent domain" (*Jacobs* v. *United States*, 290 U.S. 13, 16 (1933)). This Court has recognized two ways in which a government, the United States, for example, may exercise that power (*United States* v. *Dow*, 357 U.S. 17, 21 (1958)): "it can enter into physical possession of property without authority of a court order; or it can institute condemnation proceedings under various Acts of Congress providing authority for such takings." See also *United States* v. *Clarke*, No. 78–1693 (Mar. 18, 1980), slip op. 2–3; *United States* v. *Dickinson*, 331 U.S. 745, 747–748, 749 (1947). Appellant is proposing a third way in which the eminent domain power may be exercised: the enactment of a regulatory measure that is ultimately held by a court to be unconstitutional because, if enforced, it will deprive a landowner of any reasonable beneficial use of his property without compensating him for the deprivation. Appellant alternatively refers (Br. 35–44) to its claim of entitlement as a "cause of action" in "inverse condemnation" and

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invalidation, and the requirement of a damages remedy, given the enormous sums involved in enforced purchase of large tracts of land, would unnecessarily constrain legitimate land-use planning.

We note that the Court's reference in *Owen* (slip op. 17; footnote omitted) to a traditional understanding that municipalities "[were] deemed responsible for any private losses generated through a wide variety of its operations and functions * * * [including] uncompensated takings" does not define the types of takings referred to. However, in C. Rhyne, *Municipal Law* 738 n.42 (1957), cited by the Court (slip op. 17 n.21), the only takings case mentioned in that connection is *Jacobs* v. *Seattle*, 93 Wash. 171 (1916), a case in which the defendant municipality had constructed an incinerator for burning garbage on land adjacent to that occupied by plaintiff, and the fumes invaded plaintiff's property. We agree that when a government physically invades or seizes private property, damages are an appropriate remedy (see pages 26–27, *infra*).

as a "remedy" in "money damages." In any event, appellant rests its claim on the Federal Constitution.

In advancing that claim, appellant overlooks a vital distinction between the enactment of a law regulating the uses of property and the two types of government action described in *United States* v. *Dow*, *supra*. It is logical to speak of "the *choice* of the condemning authority to take property by physical invasion" or "by a formal condemnation action" (*United States* v. *Clarke*, *supra*, slip op. 5 (emphasis supplied)) and to award compensation for the property thus taken. In the former case, the government has appropriated property in a manner that precludes its return, giving rise to an implied promise to pay if the appropriation of property is authorized by a valid statute (see *Dugan* v. *Rank*, 372 U.S. 609, 619–623 (1963); *Hooe* v. *United States*, 218 U.S. 322 (1910)). In the latter, of course, the government has expressly announced its intention to pay by filing the proceeding.

Where a legislative body has enacted a regulatory measure such as a zoning ordinance, however, it has in effect announced a decision to define property rights rather than to acquire them. A government may, up to a point, validly "cut down" property rights without paying where the restriction on such rights is substantially related to the public welfare. *Block* v. *Hirsh*, 256 U.S. 135, 155 (1921). When the government cuts them down unreasonably, one may call the result a taking of property; but it is unreasonable to speak of the government's "choice" to acquire the property or its implied promise to pay compensation. Instead, when a court determines that a regulatory measure is invalid as a "taking," a government is then faced with a different choice: it may continue to restrict the rights and pay for them, or it may forego restricting the rights. See *Pamel Corp.* v. *Puerto Rico Highway Authority*, 621 F.2d 33, 35–36 (1st Cir. 1980).[26]

Appellant (Br. 39–41) and Amicus National Association of Manufacturers (Br. 9) cite decisions of this Court which, they assert, support their view that a damages remedy is constitu-

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[26] Of course, where a land-use statute or regulation is found invalid on the ground that it serves no legitimate public purpose, it would be impermissible even to permit a purchase of the land. Such a purchase could not be treated as a legitimate exercise of the power of eminent domain, since that can be exercised only in the service of a public purpose (see *Berman* v. *Parker*, 348 U.S. 26 (1954)), and by the same token the property could not be said to be taken, in the language of the Takings Clause, "for a public use."

tionally compelled for any regulation of property that may be deemed a taking. But most of the cases cited involve either a condemnation proceeding,[27] appropriations of water in connection with the government's construction and operation of dams,[28] or overflows onto private land from government dam projects.[29] Damages for such takings are available either on a theory of implied promise to pay as a result of the invasion or appropriation (*United States* v. *Lynah*, 188 U.S. 445, 474 (1903)) or by congressional authorization under the Tucker Act, 28 U.S.C. 1346(a) (see, *e.g.*, *Dugan* v. *Rank*, *supra*, 372 U.S. at 611). Similarly, the references in *United States* v. *Clarke*, *supra*, to compensable takings by means other than condemnation proceedings are clearly to physical seizures (slip op. 2–3, 5). No remedy questions were raised in *Kaiser Aetna* v. *United States*, 444 U.S. 164, 180 (1979) or *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978), but in any event, those cases plainly do not support appellant's contention that damages are a constitutionally required remedy for an invalid police power regulation.[30] Finally, in the *Regional Rail*

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[27] *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312 (1893).

[28] *Dugan* v. *Rank*, *supra*; *Fresno* v. *California*, 372 U.S. 627 (1963); *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275 (1958); *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725 (1950).

[29] *Danforth* v. *United States*, 308 U.S. 271 (1939); *Olson* v. *United States*, 292 U.S. 246 (1934); *United States* v. *Lynah*, 188 U.S. 445 (1903). In *Hurley* v. *Kincaid*, 285 U.S. 95 (1932), plaintiff alleged that construction of a federal floodway project would flood his land and unsuccessfully sought to enjoin it; the Court held that damages would be available to him under the Tucker Act, 28 U.S.C. 1346(a) and 1491, for damage done by any overflow. Despite plaintiff's allegation that the very existence of the statute authorizing the project placed a "cloud upon [his] title," and "materially affected and impaired the value thereof" (285 U.S. at 101 n.1), the Court concluded that no compensable injury would occur until the government actually commenced the project.

[30] *Kaiser Aetna* involved the government's exercise of its navigational servitude to require an owner of a pond-marina, who planned to lease spaces there for a fee, to permit the public to enter free of charge. The Court stated (444 U.S. at 180) that *if* the government wished to impose that public access condition, it would have to compensate the owner for the intrusions; but it acknowledged (*id.* at 179) the government's right to regulate or prohibit any dredging that would impair navigation in the adjacent bay, and it did not suggest that compensation would be required for any economic loss stemming from government action of that type. Appellant's quotation from *Penn Central* (Br. 41) is misleading. It joins fragments of two sentences, omitting critical language from the Court's reference to the question "whether a particular restriction *will be rendered invalid by the government's failure* to pay for any losses proximately caused by it * * *" (438 U.S. at 124 (emphasis added)).

Reorganization Act Cases, 419 U.S. 102 (1974), which did not involve a physical seizure, the Court did hold that the property owners would be entitled to damages if the statute at issue there operated to deprive them of full compensation for the rights they were required to surrender; but the Court satisfied itself that payment, rather than invalidation of the statutory scheme, was the congressional choice.[31]

In the present case, it cannot be said that the City chose to acquire appellant's property even if it is determined that the open space designation amounted to a use-restriction that is invalid as a taking. Indeed, the City adopted its open space plan in response to a state statute that expressly declines to authorize a city to adopt land-use measures that would constitute a taking of property without compensation. See Cal. Gov't Code § 65912 (West Supp. 1980). A finding that the City misjudged the degree to which it could validly regulate the uses of the property at issue here does not logically compel the conclusion that the City would choose to purchase it rather than amend the use restrictions.

C. The Equitable Remedies Available in the California Courts are Adequate Remedies for Claims that a Land-Use Regulation Deprives a Landowner of Substantially All Beneficial Use of Its Property

Appellant also asserts (Br. 41–44) that it is constitutionally entitled to a damages remedy because invalidation of zoning and planning measures found to constitute a taking would be an inadequate remedy for constitutional violations. The argument represents at least implicit recognition of principles of federalism affording a state court broad discretion in fashioning remedies for violations of federal rights, so long as the state court affords an adequate remedy. See generally Hill, *Constitutional Remedies*, 69 Colum. L. Rev. 1109, 1118 (1969); Hill, *The Bill of Rights and the Supervisory Power*, 69 Colum. L. Rev. 181, 181–187, 191–193 (1969); Note, *State Remedies for Federally-Created Rights*, 47 Minn. L. Rev. 815, 830–834 (1963). This Court has interfered with a state court's choice of

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[31] The Court noted (419 U.S. at 125–136, 148) that the Tucker Act remedy had not been withdrawn by Congress when enacting the Regional Rail Reorganization Act; and it further noted in connection with both types of takings alleged in the case (*id.* at 129, 148) that the legislative history of the Rail Act indicated that Congress had intended to provide the minimum amount of compensation required for the Act to be constitutionally valid.

remedy for violation of a federal right only where the sole remedy offered in the state courts is wholly inadequate, in effect denying any relief for the violation.[32] Indeed, the fact that a state *offers* an adequate remedy amounts to an adequate state ground for a decision even if the party seeking review in this Court were not accorded the remedy because he failed to apply for it. *Phyle* v. *Duffy*, 334 U.S. 431 (1948); *Woods* v. *Nierstheimer*, 328 U.S. 211, 214, 216 (1946); *Mellon* v. *McCafferty*, 239 U.S. 134 (1915).

The facts alleged in the appellant's complaint in no way suggest that, if the measures at issue here are determined to amount to a taking, the remedies of declaratory relief and mandamus would be inadequate as a matter of constitutional law. A declaration that the measures are invalid would relieve appellant of the restrictions it contends have rendered its property worthless, and were the City, for example, to impose permit requirements that amounted to an attempt to evade the court's decision, the mandamus remedy would permit a court to compel issuance of the permits. See *Selby Realty Co.* v. *City of San Buenaventura*, 10 Cal. 3d 110, 124–126, 514 P.2d 111, 120–122, 109 Cal. Rptr. 799, 807–809 (1973).[33]

Nothing in this Court's decisions suggests that, as a general proposition, the Constitution requires that a damages remedy be made available to those challenging land-use regulations as takings. Indeed, this Court has moved with caution even in de-

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[32] *Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. 239, 247 (1931); *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 682 (1930); *Ward* v. *Board of County Comm'rs*, 253 U.S. 17 (1920); *Poindexter* v. *Greenhow (The Virginia Coupon Cases)*, 114 U.S. 270, 303 (1884). See also *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 237–242 & n.45 (1977) (discussing adequate remedies for constitutional violation without directing state court to adopt one in particular); *Miranda* v. *Arizona*, 384 U.S. 436, 467 (1966) (states free to develop adequate safeguards, other than that devised by the Court, to protect the privilege against self-incrimination during custodial interrogation).

[33] Appellant's suggestion (Br. 42) that the equitable relief permitted in the California courts would be inadequate to remedy the damage for any "temporary or partial taking" need not be considered here. As noted (pages 23–24, *supra*), such a remedy *may* be available in the California courts; but in any event, appellant alleged and proved no facts establishing such special damages. The mere diminution in the market value of the property in the interim does not qualify; and the mere fact that hoped-for profits have not been earned in the interim similarly does not warrant compensation. See *Mosca* v. *United States*, 417 F.2d 1382, 1386 (Ct. Cl. 1969); *Eastport Steamship Corp.* v. *United States*, 372 F.2d 1002, 1010 (Ct. Cl. 1967) (Davis, J.). Cf. *United States ex rel. TVA* v. *Powelson*, 319 U.S. 266, 281–283 (1943); *Omnia Commercial Co.* v. *United States*, 261 U.S. 502, 513 (1923).

termining whether a damages remedy is *authorized* in suits, based directly on the Constitution, that are brought in federal courts against federal officials.[34] Plainly, a cautious approach respecting remedies is especially appropriate in the present case, involving State procedures and local governments.

As the First Circuit has recently observed in *Pamel Corp.* v. *Puerto Rico Highway Authority*, *supra*, 621 F.2d at 36 (citations omitted):

> Federal enforcement of the inverse condemnation remedy would be a singularly inappropriate intrusion into the states' traditional domains of property law and land use policy. The federal constitutional right can be secured to the individual without forcing the state to purchase his property. Voiding the offending restriction will make the owner whole. * * * Moreover, once the constitutional line has been drawn, the state or local authority administering the complex structure of land use controls should be free to decide whether the expected benefits from the restriction are worth the cost of the required compensation.

Imposing the remedy will, moreover, have a severely inhibiting effect on even legitimate land use planning; as the damage award in the present case illustrates, recoveries in such cases are likely to be substantially larger than those in other types of constitutional tort suits. Even a few misjudgments, in the form of excessive restrictions in a metropolitan zoning and land-use plan, could virtually deplete a city treasury if each one com-

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[34] Thus, it held in *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 396 (1971), and *Carlson* v. *Green*, No. 78-1261 (Apr. 22, 1980), slip op. 3-4, that damages were an available remedy for particular types of Fourth and Eighth Amendment violations where there were "no special factors counselling hesitation in the absence of affirmative action by Congress." "*Bivens* defendants are federal officials brought into federal court for violating the Federal Constitution. No state interests are implicated by applying purely federal law to them." Slip op. 9-10 n.11. But federalism concerns are certainly a "special factor counselling hesitation" in this case in mandating the availability of a particular remedy in state courts against state defendants.

Similarly in *Davis* v. *Passman*, *supra*, this Court found damages to be an appropriate remedy for a particular equal protection claim under the Due Process Clause of the Fifth Amendment where "there are available no other alternative forms of judicial relief" (442 U.S. at 245); but, as the Court noted (*id.* at 248), "were Congress to create equally effective alternative remedies, the need for damages relief might be obviated." Notably in *Carlson* v. *Green*, *supra*, slip op. 4, the Court also considered the factor whether Congress had provided an alternative remedy which it "declared to be a substitute for recovery directly under the Constitution and viewed as equally effective" (citations and emphasis omitted).

mitted the city to purchasing all of the land found to have been too severely restricted. In view of the absence, up to now, of any settled formula for defining a taking, those with the responsibility for ensuring balanced land development that does not degrade the environment will be faced with scarcely calculable risks of budget-destroying condemnation awards in making complex planning decisions.[35]

In sum, neither logic, precedent, nor policy considerations support appellant's contention that it is constitutionally entitled, on any theory, to a damages remedy should the regulatory and planning measures at issue here be deemed a taking.

CONCLUSION

Either the appeal should be dismissed for want of a substantial federal question or the judgment of the California Fourth District Court of Appeal should be affirmed.

Respectfully submitted.

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[35] Such inhibitions could, moreover, discourage state and local governments from participating in federal environmental programs that depend for their effectiveness on state and local implementation. The Coastal Zone Management Act of 1972, 16 U.S.C. 1451 *et seq.*, for example, which was enacted to mitigate the destructive effects of intense development pressures on coastal areas, is designed to encourage the States "to exercise their full authority over the lands and waters in the coastal zone by assisting the states * * * in developing land and water use programs * * * of more than local significance." Section 302(h), 16 U.S.C. 1451(h). Under Section 305 of the Act, 16 U.S.C. 1454, grants made by the National Oceanic and Atmospheric Administration have financed up to 80% of the development costs of approved programs over the last five years.

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